ERNST & YOUNG v. SJ ASSET MANAGEMENT SDN BHD (IN LIQUIDATION) & ANOR

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
HARMINDAR SINGH DHALIWAL JCA
AB KARIM AB JALIL JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-2311-11-2017]
9 JANUARY 2019

CIVIL PROCEDURE: *Discovery – Application for – Application for discovery of documents – Seeking disclosure of certain documents – Whether documents fell within ambit of s. 148B of Securities Commission Malaysia Act 1993 – Whether Securities Commission's authority required for disclosure of discovery documents – Whether Securities Commission led sufficient evidence to justify non-disclosure – Balance of public interest – Consideration of – Whether disclosure of documents beneficial to all parties – Securities Commission (Amendment) Act 2015, s. 64(4), (8) – Rules of Court 2012, O. 24*

SJ Asset Management Sdn Bhd ('SJAM') was a small private company which carried on business as a licensed fund manager. In August 2009, as part of an increased scrutiny of asset management companies, Securities Commission ('SC') conducted an examination of SJAM and in April 2010, the SC appointed BDO Consulting Sdn Bhd ('BDO') to attend at SJAM and examine its books, accounts and records, which led to an admission by SJAM of certain regulatory breaches. The SC subsequently revoked SJAM's fund manager license and BDO was later appointed as liquidator, and in that role reported an alleged discrepancy between the trust assets that had been reported to SJAM's clients and the trust assets held by custodians. SJAM was then wound up. Separate suits were thus instituted against SJAM and the appellant, Ernst & Young ('EY') by CIMB Investment Bank Berhad ('CIMB') and various other individual investors ('the plaintiffs'). The plaintiffs pursued a claim against EY, SJAM's auditor, on the basis that EY failed to detect the alleged fraud. EY denied the plaintiffs' allegations and contended, among other things, that the fraud was not reasonably recoverable. The discovery application, the subject matter of the instant appeal, was filed by EY *vide* encl.197 to seek disclosure of certain documents ('the discovery documents'). The High Court found that, notwithstanding that the discovery documents were relevant and necessary, the said documents fell within the ambit of s. 148B of the Securities Commission Malaysia Act 1993 ('SCMA 1993') and, therefore, ought not to be disclosed without the authorisation of the SC and that their disclosure would impede the proper functioning of the SC pursuant to the SCMA 1993. The issues that arose were (i) whether the SC's authorisation was required in order for SJAM

to disclose the discovery documents; and (ii) whether the trial judge had erred in finding that the balance of public interest favoured the non-disclosure of the discovery documents.

Held (allowing appeal)

Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The issue of the SC's authorisation arose as a result of the provision relating to the obligation of secrecy advocated by s. 148 of the SCMA 1993. The trial judge had taken the position that was the current s. 148 introduced by the Securities Commission (Amendment) Act 2015 ('2015 Amendment') which came into force on 15 September 2015, that was applicable. Regardless of Parliament's intention to widen the secrecy obligations with the said 2015 Amendment, Parliament's intention was to clearly also preserve any rights which accrued prior to the amendment through s. 64 of the 2015 Amendment. The 'right' or 'privilege' acquired or which accrued under s. 64(4) and 64(8) of the 2015 Amendment included an application for discovery of documents. Thus, there was no need for the consent of the SC. Sections 148A and 148B which were also introduced by the 2015 Amendment Act were ineffective and could not deprive EY of its right to obtain disclosure. (paras 16-20)

(2) The discovery application was made in the context of a private action between the two private parties where the SC was not even a party. It did not affect SC's public functions. Further, the disclosure of the discovery documents did not trigger any recognisable head of public interest immunity *ie* national security, international relations, workings of central government, other branches of public service, the police and armed forces, confidentiality and informants. Also, the deponent to the affidavit filed by the SC was not the appropriate person to properly consider the documents or the basis for the claim to immunity from disclosure. The deponent did not seem to be familiar with the effect of the documents and depended upon the solicitors' advice to come to a view that disclosure should not be allowed. The SC's affidavits were lacking in specificity and detail to support the SC's argument that, on the facts, the documents ought not to be disclosed due to public interest. The SC had not led sufficient evidence to justify non-disclosure. (paras 25, 32, 33, 34 & 35)

(3) After determining that the discovery documents were relevant and necessary for a fair trial, the trial judge should not have refused to make an order for production without examining the documents and considering them in light of the other materials. Any concerns about future investigations being affected and public confidence in the SC being undermined was unwarranted. As for the ground concerning the

floodgate effect, this was against the established jurisprudence as the law in the form of O. 24 Rules of Court 2012 allowed for discovery of documents in civil litigation. Disclosure orders would be made only in the appropriate cases where the legal test has been met. The court functions as a gatekeeper by assessing the merits of each individual application. The fear of floodgate effect was unjustified and unfounded. (paras 36-39)

(4) The SC must act fairly in that there must be equal access to documents to prevent one party from having a litigious advantage or disadvantage as the case may be. As SJAM has had the benefit of having the documents sought for in the application, the SC's stand in opposing disclosure was rather curious. The documents concerned were no longer confidential. It was to the benefit of all parties that it be disclosed as to how the fraud had occurred and the reasons why action was taken against SJAM. (para 40)

(5) The courts are entrusted with the duty of being the guardians of the public interest, and in the exercise of this duty, to weigh both the public interest in the administration of justice and other public interests that may arise. The fact that the SC was a public body did not vindicate its failure to give clear, reasoned and valid justifications for its position in resisting disclosure. Bare assertions for non-disclosure would not suffice. Further, the trial judge's assessment of the balance of public interest was flawed and the final decision to disallow disclosure was unsupported by principle and by the evidence. The trial judge had failed to properly weigh the likelihood of harm that non-disclosure would cause to the party seeking disclosure and to the administration of justice as a whole. Thus, the decision of the trial judge was plainly wrong and could not be upheld. (paras 44-47)

Bahasa Malaysia *Headnotes*

SJ Asset Management Sdn Bhd ('SJAM') adalah sebuah syarikat swasta kecil yang menjalankan perniagaan sebagai pengurus dana berlesen. Pada Ogos 2009, sebagai sebahagian pengawasan yang meningkat terhadap syarikat pengurusan aset, Suruhanjaya Sekuriti ('SS') melakukan pemeriksaan terhadap SJAM dan pada April 2010, SS melantik BDO Consulting Sdn Bhd ('BDO') untuk memeriksa SJAM serta buku-bukunya, akaun-akaunnya dan rekod-rekodnya, yang mengakibatkan pengakuan SJAM terhadap pelanggaran peraturan-peraturan tertentu. Lesen pengurusan dana SJAM kemudian dibatalkan oleh SS dan BDO dilantik sebagai pelikuidasi, dan dalam peranan tersebut, telah melaporkan dakwaan percanggahan antara aset-aset amanah yang dilaporkan kepada pelanggan-pelanggan SJAM dan aset-aset amanah yang dipegang oleh pemegang-pemegang. SJAM kemudiannya telah digulung. Guaman berasingan telah dimulakan terhadap SJAM dan perayu, Ernst & Young ('EY') oleh CIMB Investment Bank Berhad ('CIMB') dan pelbagai pelabur individu lain ('plaintif-plaintif').

Plaintif-plaintif membuat tuntutan terhadap EY, juruaudit SJAM, atas alasan EY gagal mengesan penipuan yang didakwa. EY menafikan dakwaan-dakwaan plaintif-plaintif dan menghujahkan, antara lain, bahawa penipuan tidak dapat dikenal pasti secara munasabah. Permohonan penzahiran, subjek perkara rayuan ini, difailkan oleh EY melalui lamp. 197 untuk menuntut pendedahan dokumen-dokumen tertentu ('dokumen-dokumen penzahiran'). Mahkamah Tinggi mendapati, walaupun dokumen-dokumen penzahiran relevan dan perlu, dokumen-dokumen tersebut terangkum dalam lingkungan s. 148B Akta Suruhanjaya Sekuriti Malaysia 1993 ('ASSM 1993') dan oleh itu tidak boleh didedahkan tanpa kebenaran SS dan bahawa pendedahannya akan menghalang SS berfungsi dengan baik menurut ASSM 1993. Isu-isu yang timbul adalah (i) sama ada kebenaran SS diperlukan untuk SJAM mendedahkan dokumen-dokumen penzahiran; dan (ii) sama ada hakim bicara terkhilaf apabila mendapati bahawa keseimbangan kepentingan awam memihak pada tidak mendedahkan dokumen penzahiran.

Diputuskan (membenarkan rayuan)
Per Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Isu kebenaran SS timbul akibat peruntukan berhubungan kewajipan kerahsiaan disokong oleh s. 148 ASSM 1993. Hakim bicara telah mengambil kedudukan bahawa s. 148 semasa ini diperkenalkan oleh Akta Suruhanjaya Sekuriti (Pindaan) 2015 ('Pindaan 2015') yang berkuat kuasa pada 15 September 2015, yang diguna pakai. Tanpa mengambil kira niat Parlimen untuk memperluaskan kewajipan kerahsiaan dengan Pindaan 2015 tersebut, niat Parlimen dengan jelasnya adalah untuk memelihara mana-mana hak yang terakru sebelum pindaan melalui s. 64 Pindaan 2015. 'Hak' atau 'keistimewaan' yang diperoleh atau terakru bawah sub-s. 64(4) dan 64(8) Pindaan 2015 termasuk permohonan untuk penzahiran dokumen-dokumen. Oleh itu, tiada keperluan untuk kebenaran SS. Seksyen-seksyen 148A dan 148B yang juga diperkenalkan melalui Akta Pindaan 2015 tidak berkesan dan tidak boleh menafikan hak EY memperoleh pendedahan.

(2) Permohonan penzahiran dibuat dalam konteks tindakan persendirian antara kedua-dua pihak swasta dan SS bukan pihak yang terlibat. Fungsi awam SS tidak terjejas sama sekali. Tambahan lagi, pendedahan dokumen-dokumen penzahiran tidak menjejaskan mana-mana tajuk imuniti kepentingan awam iaitu keselamatan negara, perhubungan antarabangsa, kerja-kerja Kerajaan pusat, cawangan lain dalam perkhidmatan awam, pihak polis dan angkatan tentera, kerahsiaan dan pemberi maklumat. Juga, deponen afidavit oleh SS bukanlah pihak yang sesuai untuk mempertimbangkan dokumen-dokumen atau dasar tuntutan imuniti daripada pendedahan. Deponen seolah-olah tidak biasa dengan kesan dokumen-dokumen dan bergantung pada nasihat peguam cara untuk mencapai keputusan bahawa pendedahan tidak patut dibenarkan.

Afidavit-afidavit SS kekurangan kekhususan dan keperincian untuk menyokong hujahan SS bahawa atas fakta dokumen-dokumen tidak patut didedahkan kerana kepentingan awam. SS tidak mengemukakan keterangan mencukupi untuk menjustifikasikan ketidakdedahan.

(3) Selepas menentukan dokumen-dokumen penzahiran adalah relevan dan perlu untuk perbicaraan adil, hakim bicara tidak sepatutnya menolak untuk membuat perintah pengemukaan tanpa memeriksa dokumen-dokumen dan mempertimbangkannya berdasarkan bahan-bahan lain. Apa-apa kebimbangan tentang siasatan masa depan akan terjejas dan keyakinan orang ramai terhadap SS akan terjejas tidak wajar. Berkenaan alasan kesan kebanjiran, ini bertentangan dengan perundangan yang terbukti kerana undang-undang dalam bentuk A. 24 Kaedah-kaedah Mahkamah 2012 membenarkan penzahiran dokumen-dokumen dalam tindakan undang-undang sivil. Perintah-perintah pendedahan hanya akan dibuat dalam kes-kes yang sesuai apabila ujian undang-undang telah dipenuhi. Fungsi mahkamah adalah sebagai 'penyaring maklumat' dengan menilai merit-merit setiap permohonan. Ketakutan akan kesan kebanjiran tidak wajar dan tidak berasas.

(4) SS harus bertindak secara adil bahawa akses yang sama harus diberikan pada dokumen-dokumen untuk menghalang satu pihak daripada kelebihan atau kelemahan litigasi mengikut kes yang berkenaan. Kerana SJAM telah mendapat manfaat menerima dokumen-dokumen yang dituntut dalam permohonan, pendirian SS menentang pendedahan agak aneh. Dokumen-dokumen berkenaan tidak lagi sulit. Semua pihak berkenaan akan menerima manfaat pendedahan berkenaan penipuan yang berlaku dan alasan-alasan kenapa tindakan diambil terhadap SJAM.

(5) Mahkamah-mahkamah diamanahkan dengan tugas melindungi kepentingan awam, dan dalam pelaksanaan tugasnya, untuk mengambil kira kedua-dua kepentingan awam dalam pentadbiran keadilan dan kepentingan-kepentingan awam lain yang mungkin timbul. Fakta bahawa SS adalah sebuah perbadanan awam tidak menjustifikasikan kegagalannya memberi justifikasi yang jelas, munasabah dan sah untuk pendiriannya menolak pendedahan. Pengataan kosong berkenaan ketidakdedahan tidak memadai. Tambahan lagi, penilaian hakim bicara berkenaan keseimbangan kepentingan awam adalah cacat dan keputusan muktamad untuk tidak membenarkan pendedahan tidak disokong oleh prinsip dan keterangan. Hakim bicara gagal mempertimbangkan dengan betul kemungkinan keburukan yang akan berlaku pada pihak yang menuntut pendedahan dan pada pentadbiran keadilan secara keseluruhan jika tiada pendedahan. Oleh itu, keputusan hakim bicara dengan jelas salah dan tidak boleh disahkan.

Case(s) referred to:
Air Canada v. Secretary of State for Trade (No 2) [1983] 1 All ER 161 ***(refd)***
BA Rao & Ors v. Sapuran Kaur & Anor [1978] 1 LNS 14 FC ***(refd)***
Compaignee Financiere du Pacifique v. Peruvian Guano Co (1882) 11 QBD 55 ***(refd)***
Competition Commission v. Nutanix Hong Kong Limited and Others [2018] HKCT 1 ***(refd)***
Conway v. Rimmer and Another [1968] 1 All ER 874 ***(refd)***
Conway and Burmah Oil Co Ltd v. Bank of England [1979] 3 All ER 700 ***(refd)***
D v. National Society for the Prevention of Cruelty to Children [1977] 1 All ER 589 ***(refd)***
Duncan v. Cammell Laird & Co Ltd [1942] 1 All ER 587 ***(refd)***
Goodridge v. Chief Constable of Hampshire Constabulary [1999] 1 All ER 896 ***(refd)***
Lees v. Motor Insurers' Bureau [1953] 1 WLR 620 ***(refd)***
Science Research Council v. Nasse [1979] 3 All ER 673 ***(refd)***
SFC v. Wong Yuen Yee & Ors [2017] 2 HKC 332 ***(refd)***
Slaney v. Kean [1970] 1 Ch 243 ***(refd)***
Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC ***(refd)***
Wallace Smith Trust Co Ltd (in Liq) v. Deloitte Haskins & Sells [1996] 4 All ER 403 ***(refd)***
Yekambaran Marimuthu v. Melayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 77
Rules of Court 2012, O. 24 rr. 3, 7, 15
Securities Commission Malaysia Act 1993, ss. 148A, 148B

Other source(s) referred to:
Disclosure, Sweet & Maxwell, 4th edn, 2012, paras 12.17-12.26

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[Editor's note: For the High Court judgment, please see CIMB Investment Bank Bhd v. Ernst & Young (AF 0039) & Anor [2018] 1 LNS 1133 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This appeal raises conflicting policy issues in relation to the right of discovery, including what we were told are novel questions of law in Malaysia pertaining to the application of the doctrine of public interest immunity in so far as disclosure of documents is concerned.

[2] The appeal arose as a result of the order of the Kuala Lumpur High Court dated 1 November 2017. The learned judge had dismissed the appellant's ("EY") application for discovery filed pursuant to O. 24 r. 3 and/or r. 7 of the Rules of Court 2012 ("ROC 2012") ("discovery application"). In that discovery application, EY had sought for documents and information

which were made available to the Securities Commission ("SC") during SC's supervisory assessment of the first respondent, SJ Asset Management Sdn Bhd ("SJAM").

[3] We heard the appeal on 5 September 2018. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

Background

[4] The background facts leading to the discovery application are not disputed and can be stated as follows. SJAM was a small private company which carried on business as licensed fund manager. In that role, SJAM administered, managed and invested clients' funds in various investments in the global markets. The funds managed by SJAM were held at all times by reputable third-party custodian banks.

[5] In August 2009, as part of increased scrutiny of asset management companies, the SC conducted an examination of SJAM ("2009 SC examination"). In April 2010, the SC appointed BDO Consulting Sdn Bhd ("BDO") to attend at SJAM and examine its books, accounts and records ("2010 BDO examination"). The 2010 BDO examination led to an admission by SJAM of certain regulatory breaches.

[6] As a result of SJAM's admission, the SC revoked SJAM's fund manager license on 23 July 2010. BDO was later appointed as liquidator, and in that role reported an alleged discrepancy between the trust assets that had been reported to SJAM's clients and the trust assets held by custodians. SJAM was then wound up in October 2010.

[7] After learning of the discrepancy in trust assets, separate suits were instituted against SJAM and EY. CIMB Investment Bank Berhad ("CIMB"), who had advised its own clients to invest through SJAM, commenced Civil Suit No. 22NCC-422-03-2012 (Suit 422) and various other individual investors ("investors"), who used SJAM's services, commenced Civil Suit No. 22NCC-431-03-2012 (Suit 431).

[8] CIMB and the investors, for convenience referred together as the plaintiffs, alleged in those suits that the discrepancy in trust assets arose as a result of fraud committed by three defendants, namely:

(a) Tan Whai Oon, the Managing Director of SJAM during the relevant time period;

(b) Annalong Corporation Ltd., a company allegedly associated with SJAM; and

(c) SJAM, the fund manager.

[9] The plaintiffs also pursued a claim against EY, SJAM's auditor, on the basis that EY failed to detect the alleged fraud. EY has denied the plaintiffs' allegations and contends, among other things, that the fraud was not reasonably discoverable.

The Discovery Application

[10] The discovery application, the subject matter of the instant appeal, was filed by EY *vide* encl. 179, to seek disclosure of the following documents (collectively referred to as the "discovery documents"):

(i) Details and/or documents relating to all investigations and/or examinations by the SC on SJAM, including but not limited to the SC's investigation and/or examination in the 2009 SC examination;

(ii) All reports issued by BDO pursuant to its appointment as independent auditor by the SC on 14 April 2010 ("BDO reports");

(iii) Documents relating to the SC issuing a notice to show cause on 30 December 2009 to SJAM and subsequent meetings with SJAM following such notice ("SC show cause and meeting documents");

(iv) Documents relating to SJAM responding in writing to the SC's notice to show cause ("SJAM response to show cause").

[11] Meanwhile, an application to intervene by the SC was granted by the High Court on 25 August 2017. After hearing the parties, the discovery application was dismissed by the High Court on 1 November 2017 with costs of RM12,000 to be paid to the SC and RM4,000 to be paid to SJAM.

[12] In dismissing the discovery application, the learned High Court Judge found, firstly, that the discovery documents were relevant and necessary as necessitated by O. 24 of ROC 2012. There is no quarrel about this finding. In any event, we think that the learned judge was justified in coming to this finding as the discovery documents contained evidence relevant to the issues in that suit and contained information which may advance EY's case or damage the plaintiffs' case against EY (see *Yekambaran Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581 and *Compaignee Financiere du Pacifique v. Peruvian Guano Co* [1882] 11 QBD 55).

[13] The learned judge, however, found that notwithstanding that the discovery documents were relevant and necessary, the said documents fell within the ambit of s. 148B of the Securities Commission Malaysia Act 1993 ("SCMA 1993") and therefore ought not to be disclosed without the authorisation of the SC.

[14] The learned judge further held that there was no waiver of the SC's authorisation as EY's remedy to challenge the SC's omission (silence) is by way of judicial review. And finally, the learned judge also found that notwithstanding the relevant documents being relevant and necessary, their disclosure as a class would be injurious to public interest as it would impede the proper functioning of the SC pursuant to the SCMA 1993.

The Instant Appeal

[15] Before us, the findings of the learned judge and reasons given for dismissing the discovery application were assailed on a number of grounds. These grounds are now the issues for consideration and decision in this appeal. In this regard, we agree that the pivotal issues for consideration in the appeal are whether the SC's authorisation is required in order for SJAM to disclose the discovery documents and whether the learned judge had erred in finding that the balance of public interest favours non-disclosure of the discovery documents.

Whether Authorisation Of The SC Is Required

[16] The issue of the SC's authorisation arises as a result of the provision relating to the obligation of secrecy advocated by s. 148 of SCMA 1993. Suit 422 and Suit 431 were instituted in 2012 when the s. 148 that existed at the time was the one introduced by the Securities Commission (Amendment) Act 2010 (Act A 1369) ("2010 Amendment") which came into force on 1 April 2010. The relevant part of that provision reads as follows:

148. Obligation of secrecy

(1) Except for any of the purposes of the securities law or for the purpose of any civil or criminal proceedings under any written law or where otherwise authorised by the Commission or subject to section 124 of the Evidence Act 1950, any:

(a) member of Commission;

(b) member of Shariah Advisory Council;

(c) member or the Audit Oversight Board;

(d) member of any committees of the Commission, Shariah Advisory Council or Audit Oversight Board;

(e) officer, servant or agent of the Commission; or

(f) person attending any meeting of-

(i) the Commission;

(ii) any committees of the Commission;

(iii) Shariah Advisory Council; or

(iv) Audit Oversight Board,

A shall not disclose any information which has been obtained by him in the course of his duties and which is not published in pursuance of the securities laws.

[17] As set out in the manner above, the 2010 Amendment allows disclosure without the SC's authorisation "for any of the purposes of the B securities law or for the purpose of any civil or criminal proceedings under any written law". In the instant case, disclosure under the 2010 Amendment is permissible because the discovery documents are necessary for purposes of the securities laws. The plaintiffs in the High Court rely on the Securities Industry Act 1983 and the Capital Markets and Services Act 2007 to find C their causes of action. The discovery documents are also necessary for the purpose of civil proceedings. The plaintiffs' claims in the High Court are founded on common law negligence and breaches of statutory duty under the Companies Act 1965.

[18] However, the learned judge took the position that is was the current D s. 148 introduced by the Securities Commission (Amendment) Act 2015 (Act A1489) ("2015 Amendment"), and which came into force on 15 September 2015, that was applicable as when the discovery application was heard on 2 October 2017, the 2015 Amendment had taken effect.

[19] With respect, we are unable to accede to the learned judge's view on E the applicable law. We agree that the regardless of Parliament's intention to widen the secrecy obligations with the 2015 Amendment, Parliament's intention was to clearly also preserve any rights which accrued prior to the amendment through s. 64 of the 2015 Amendment Act. The relevant part of s. 64 of the 2015 Amendment Act reads:

F **64. Saving and transitional**

… (4) Any right, privilege, obligation or liability acquired, accrued or incurred before the effective date or any legal proceedings, remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act and shall continue to remain in force as if this G Act had not been enacted.

…(8) Any right, privilege, obligation or liability acquired, accrued or incurred before the effective date or any legal proceedings, remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act and shall continue to remain in force as if this H Act had not been enacted.

[20] In this context, it was plain to us that the "right" or "privilege" acquired or which accrued under sub-ss. 64(4) and 64(8) of the 2015 Amendment Act included an application for discovery of documents. In any event, we agree that the term "legal proceedings" used in the same sub-I sections can refer to the institution of the writ action filed by CIMB Investment Bank against EY on 30 April 2012 which was way before the effective date. It cannot be restricted to the time when the discovery

application was filed on 11 July 2017 which was in effect an interlocutory application that emanated from the same writ action filed by CIMB Investment Bank. It must follow that there is no need for the consent of the SC. For the same reasons, ss. 148A and 148B which were also introduced by the 2015 Amendment Act are ineffective and cannot deprive EY of its right to obtain disclosure.

[21] It is axiomatic that the preservation of rights under the 2015 Amendment Act is not unusual or novel as it is consistent with the general rule against retrospective application as formalised under s. 77 of the Interpretation Acts 1948 and 1967 as follows:

> **77. Effect of repeal**
>
> Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not:
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
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> (b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed;
>
> or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or
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> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed; or
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> (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

[22] In coming to this view, we have not overlooked the submissions with regard to the consent order dated 27 July 2016. By this order, parties in Suit 422 had agreed for SJAM to produce certain documents subject to SC's consent. Now, the learned judge appeared to take the view that EY had acknowledged that consent of SC was required for disclosure of the discovery documents.

[23] On this score, we do not think the said consent order precludes EY from pursuing its rights to obtain a disclosure order from the court in the event SC fails to provide the consent. We take the view that EY had not waived its rights to apply for specific discovery if SC had refused to give consent. In other words, the consent order cannot be considered to be a commentary on any statutory requirement for consent.

[24] It is trite law that a statement of the law cannot be pronounced by consent (see *Lees v. Motor Insurers' Bureau* [1953] 1 WLR 620; *Slaney v. Kean* [1970] 1 Ch 243). In other words, arguments must be heard and an opinion pronounced by the court on a statement of the law. As such, we do not think there was any acknowledgment nor any incongruity in EY's position that the consent of the SC is not a requirement. Since we have indicated that according to the prevailing law no consent of SC was required, the consent order requiring consent has become ineffective.

[25] In view of our decision that no consent of SC is required for disclosure, the arguments on whether EY should have sought a judicial review of SC's non-action or silence with regard to the issue of consent has also become irrelevant. We would, however, observe that the failure of EY to mount any judicial review did not affect its right to pursue an application for discovery against SJAM. The arguments raised in this connection appear to overlook the point that the discovery application was made in the context of a private action between two private parties where the SC is not even a party. It does not affect SC's public functions.

Whether Disclosure Injurious To Public Interest

[26] In addition to finding that the SC's authorisation was required by statute, the learned judge accepted SC's objection to disclosure on the grounds of public interest immunity. The importance of public interest in the context of discovery is echoed in O. 24 r. 15 of ROC 2012 which provides that the rules relating to discovery are "subject to any written law or any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest" (see also *BA Rao & Ors v. Sapuran Kaur & Anor* [1978] 1 LNS 14; [1978] 2 MLJ 146; *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733). This proviso probably had its genesis in the British Crown Proceedings Act 1947 which had preserved the so-called "Crown privilege" as decided by the House of Lords in *Duncan v. Cammell Laird & Co Ltd* [1942] 1 All ER 587.

[27] It is inevitable that when public interest immunity is asserted, the court will be faced with competing public interests where disclosure is concerned. On the one hand is the public interest of preventing harm to the nation and the public service by such disclosure of documents. On the other hand is the public interest of promoting the fair and effective administration of justice where harm would be caused if the withholding of material evidence results in the court being unable to make a fair determination of the dispute.

[28] In the context of injury to public interest, in what came to be the leading case on the subject, the House of Lords in *Conway v. Rimmer and Another* [1968] 1 All ER 874 ("*Conway*") held that disclosure could only be ordered if the risk of injury to the public interest is outweighed by the injury

to the public interest in the administration of justice. In other words, a balancing exercise must be carried out to determine on the facts of each case which public interest should prevail.

[29] Based on the decisions in *Conway and Burmah Oil Co Ltd v. Bank of England* [1979] 3 All ER 700, Bingham J in *Air Canada v. Secretary of State for Trade (No. 2)* [1983] 1 All ER 161 ("*Air Canada*") summarised the principles to be followed with public interest immunity claims. Although His Lordship's decision to allow disclosure was set aside by the Court of Appeal, the principles stated, as follows, have gained universal acceptance (at p. 165):

> 3. The plaintiff's summons seeking production of documents for which the Secretary of State has claimed public interest immunity.
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> Since the decision in *Conway v. Rimmer* [1968] 1 All ER 874, [1968] AC 910 the question of public interest immunity has arisen on a number of occasions, most importantly for present purposes in *Burmah Oil Co Ltd v. Bank of England* [1979] 3 All ER 700, [1980] AC 1090. From the authorities, and that authority in particular, I derive the following as the principles to be followed where it is sought to withhold documents on the ground that they belong to a class such that their production would be injurious to the public interest and where that claim is contested by a party to the litigation.
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> 1. The first task of the court is to peruse the certificate or document in which the claim for public interest immunity is made in order to satisfy itself (a) that the class to which the documents are said to belong is one recognised as capable of attracting public interest immunity or is at least closely analogous to a recognised class, (b) that there is no reason to believe the documents do not fall within the class claimed, and (c) that the documents themselves and the basis of the claim to immunity have apparently been the subject of proper consideration by an appropriate person. If these conditions are met, in the absence of any contrary indication the court will treat the certificate or claim, not as conclusive, but as motivated by a concern for the public interest which (despite the inevitable difference of viewpoint) is as genuine as that of the court itself. In some cases the nature of the class will virtually conclude the matter (for example, where Cabinet papers or diplomatic dispatches are concerned) but such cases are the exception and are not those which in practice give rise to controversy.
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> 2. If the court is satisfied that the party seeking to withhold the documents has made a valid claim for public interest immunity the next step is to determine whether the party seeking production is able to show a public interest in production. To do so, such party must show not only that the documents are relevant under the *Peruvian Guano* test (a condition which the claim for immunity itself assumes to be satisfied: see *Compagnie Financiers et Commerciale du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55) but that they are necessary for disposing fairly of the cause or matter or (to put it in a different way) are necessary for the due

A administration of justice: see the *Burmah Oil* case [1979] 3 All ER 700 at 708, 714, 718, 731, [1980] AC 1090 at 1113, 1121, 1125, 1141. If it appears to the court that the documents are likely to be necessary for the due administration of justice the court is confronted by a second aspect of the public interest, fit to be weighed in the balance against the first.

B 3. If the court is satisfied that there is a public interest both in production and in non-disclosure it must consider the relative substance of each claim with a view to forming a judgment whether, on balance, the public interest will be better served by the withholding of the documents or by their production. It might be concluded that in respect of some documents the claim for immunity, although properly made, was of relatively little weight C (as in the *Burmah Oil* case [1979] 3 All ER 700 at 714, 720, [1980] AC 1090 at 1121, 1128). It might conversely emerge (as it did in the *Burmah Oil* case during argument in the House of Lords) that only very few of the documents were truly necessary for resolving the real issues in the action, and then the claim for immunity would have to be considered in relation to those documents. But the task of the court is to weigh the harm which D production would cause to the business of government or public administration against the harm which non-disclosure would do to the just determination of the particular case and decide where the balance of public interest lies.

4. Where the court is of opinion that the balance of public interest lies E clearly against production it will not inspect the documents on the offchance that that conclusion might prove to be wrong if the documents were looked at. But the court may privately inspect the documents, certainly if it is provisionally inclined to order production (see *Conway v. Rimmer* [1968] 1 All ER 874 at 888, 900, [1968] AC 910 at 953, 971) but also, it would seem, if careful consideration of the conflicting claims in the F absence of the documents leaves the court subject to grave and disquieting doubts as to where the balance lies: see the *Burmah Oil* case [1979] 3 All ER 700 at 726, 734, [1980] AC 1090 at 1135, 1145. If provisionally inclined to order production the court would not ordinarily make that order without first inspecting the documents privately.

G **[30]** In the instant case, the learned judge accepted the SC's submission that the balance of public interest tilts on the side of non-disclosure to protect the effective functioning of the SC pursuant to the SCMA 1993. The following reasons were provided in coming to this conclusion:

(a) It is in the interests of public that the Discovery Documents be H protected as a class to fully protect the investigative and supervisory powers of the SC given that it is inevitable that each document will be based on, or contain references to other similar investigation or supervisory documents.

(b) It would be injurious to public interest if the Discovery Documents were ordered to be disclosed by this Court as this would impede the I proper functioning of the SC i.e. there is a risk that future investigations carried out by the SC may be affected and public confidence in the SC be undermined.

(c) The protection from disclosure afforded to the SC is not limited to a one-off situation involving merely SJAM, as codified in the SCA. On the other hand, a precedent in allowing disclosure of the SC's investigation papers would be established if this Discovery Application is allowed, resulting in a floodgate effect ie, large amounts of subsequent litigation seeking for such a disclosure.

(d) Further, third parties may be discouraged from coming forward to give evidence or from giving evidence fully and freely and likewise it would be important to preserve the integrity and independence of reports made pursuant to the investigations conducted by the SC.

[31] These four grounds given by the SC to oppose disclosure, and which were accepted by the learned judge, were assailed by learned counsel for EY. The criticism advanced by counsel was that the SC's generic reasoning in support of the claim to public interest immunity was vague, bare and unsubstantiated. It was contended that no evidence or reasoning was put forward to establish that the discovery documents belonged to a class which was recognised as capable of attracting public interest immunity. Blanket and bare assertions that disclosure would be injurious to the public interest, it was argued, should be rejected by the law.

[32] After careful consideration, we came to the view that this criticism was not without merit. In the first place, the disclosure of the discovery documents does not trigger any recognisable head of public interest immunity. According to the learned authors of *Disclosure* (4th edn, Sweet & Maxwell, 2012), the recognised heads of public interest immunity are national security, international relations, workings of central government, other branches of public service, the police and armed forces, confidentiality and informants (at paras 12.17 to 12.26).

[33] Secondly, as suggested in *Air Canada*, the court must be satisfied that the documents and the basis for the claim to immunity have been properly considered by an appropriate person. We agree with the appellant that the deponent to the affidavit filed by the SC was not the appropriate person to properly consider the documents or the basis for the claim to immunity from disclosure.

[34] The deponent did not seem to be familiar with the effect of the documents and depended upon the solicitors' advice to come to a view that disclosure should not be allowed. The reasons given appeared to be that of the SC's solicitors. In the end, the SC's affidavits were lacking in specificity and detail to support the SC's argument that on the facts the documents ought not to be disclosed due to the public interest.

[35] In the same context, we are not persuaded that the SC has led sufficient evidence to justify non-disclosure. For this purpose, the affidavits filed to oppose disclosure must be carefully scrutinised. For instance, the affidavits filed by the SC could have contained an averment that the documents are

required for a pending investigation or that disclosure would prejudice an ongoing criminal prosecution. If there was such an assertion, it would be the duty of the court to consider and if there is sufficient justification, disclosure would be refused. However, there was no such assertion in the present case except for bare, sweeping and unsubstantiated arguments against disclosure which the court would be unable to accept (see *Competition Commission v. Nutanix Hong Kong Limited and Others* [2018] HKCT 1).

[36] Thirdly, we agree that after determining that the discovery documents were relevant and necessary for a fair trial, the learned judge should not have refused to make an order for production without examining the documents and considering them in the light of the other material as advocated in *Goodridge v. Chief Constable of Hampshire Constabulary* [1999] 1 All ER 896. The jurisprudence in this respect is settled in that the court should inspect the documents in circumstances where the documents requested satisfy the ordinary test for production and disclosure is challenged on the basis of public interest immunity (see *Wallace Smith Trust Co Ltd (in Liq) v. Deloitte Haskins & Sells* [1996] 4 All ER 403; *Science Research Council v. Nasse, BL Cars Ltd (formerly Leyland cars) v. Vyas* [1979] 3 All ER 673).

[37] Coming now to the reasons given by the learned judge for refusing disclosure, for the first ground, we were unable to ascertain how the investigative or supervisory powers of the SC would be affected as this was not explained in the affidavits. As alluded to earlier, the affidavits only refer in broad terms to the general investigative and supervisory powers of the SC without providing any particulars.

[38] For the second ground, we must say, with respect, that any concerns about future investigations being affected and public confidence in the SC being undermined is unwarranted. There was simply no evidence of any ongoing or forthcoming investigations into SJAM. In fact, investigations were already completed with SJAM's licence being revoked and enforcement action taken to wind up SJAM. At least, evidence of any such prejudice to future investigations ought to have been provided in the affidavits.

[39] As for the third ground concerning the floodgate effect, this is against the established jurisprudence as the law in the form of O. 24 of the ROC 2012 allows for discovery of documents in civil litigation. Disclosure orders will be made only in the appropriate cases where the legal test has been met. The court functions as a gatekeeper by assessing the merits of each individual application. The fear of the floodgate effect seems to us to be unjustified and unfounded.

[40] In this context as well, the role of the SC must be properly appreciated. The SC must act fairly in that there must be equal access to documents to prevent one party from having a litigious advantage or

disadvantage as the case may be. As SJAM has had the benefit of having the documents sought for in the application, the SC's stand in opposing disclosure is rather curious. The documents concerned are no longer confidential. In other words, the documents are no longer with SC alone. As stated earlier, it is pertinent that discovery is only sought against SJAM and not the SC. It is to the benefit of all parties that it is disclosed as to how the fraud had occurred and the reasons why action was taken against SJAM.

[41] In this respect, we agree with the sentiments expressed in the recent Hong Kong case of *SFC v. Wong Yuen Yee & Ors* [2017] 2 HKC 332 where the court of first instance observed that the proper role of the Hong Kong equivalent of the SC is to make all materials available for potential use in a trial to ensure a just outcome:

> 76. It has to be borne in mind that these are proceedings in which the respondents are faced with an adversary in the form of a governmental regulator which controls the investigatory process. With powers that rank high in the 'hierarchy' of coercive powers for obtaining information and of investigating suspected wrongdoing (see *Stern, supra*, at p. 2257D), the Commission occupies a position analogous to criminal law enforcement agencies, with the additional advantage that an interviewee's privilege against self-incrimination is abrogated.
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> 77. Given the status of the Commission as a statutory body established for public functions, it seems to me that the observations of Sopinka J in *R v. Stinchcombe, supra*, at p 333h-i are apposite: 'the fruits of the investigation' which are in the Commission's possession are not its own property for use in securing a disqualification order but the property of the public to be used to ensure that justice is done. The proper role of the Commission is not a prosecutor bent on securing the disqualification of a respondent, but a fair-minded regulator willing if not anxious to make all materials available for potential use in the trial to ensure a just outcome.
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> 78. The requirement in civil cases that discovery has to be necessary for 'disposing fairly of the cause or matter' directs attention to the question whether one party enjoys a 'litigious advantage' or suffers a 'litigious disadvantage' with reference to access to documents: *Taylor v. Anderton* [1995] 1 WLR 447, 462C. The notion of equal access to documents relevant for the preparation of one's case is an important facet of fairness in this kind of case, where the Commission has taken on the role of an investigator. The Commission is not in original possession of any relevant information or documents generated by any transaction to which it was party. It has acquired the documents only as a result of its investigation. The respondent is generally not in a position to specify what information and documents the Commission has, other than that which it has chosen to disclose. It is to be questioned whether practical fairness can be achieved if a respondent is required in this context to pinpoint a concrete and specific document or class of documents (so narrowly defined as to contain no irrelevant documents) before he can obtain discovery.

[42] On the last ground, which alluded to third parties from being discouraged to give evidence, again we find this reason given by the SC to be speculative, unsupported and unfounded in principle. There was no evidence that the 2009 SC examination or the 2010 BDO examination relied on any information given by informants. It appears to us from the appointment letter to BDO that the examinations focussed solely on SJAM's books, accounts and records.

[43] Now, the learned judge also appeared to have relied on the case of *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733 in arriving at the conclusion that disclosure must be refused for the effective functioning of departments or organs of central government. With respect, the learned judge's reliance on *Ishak*'s case is misplaced as the present discovery application is in no way concerned with the identity of informants. Unlike *Ishak*'s case, where disclosure of statements made by informants was sought, no such disclosure is sought here. In any event, the discovery documents are in the possession of SJAM and if there are informants involved, SJAM would already be aware of them. So the concerns about the candour of future informants are unfounded.

[44] In the circumstances, we were constrained to hold that the learned judge's assessment of the balance of public interest was flawed and the final decision to disallow disclosure was unsupported by principle and by the evidence. The learned judge had failed to properly weigh the likelihood of harm that non-disclosure would cause to the party seeking disclosure and to the administration of justice as a whole. The learned judge appeared to have taken the mistaken view that once public interest immunity is raised by a statutory body, the decision on whether to allow or disallow discovery is absolutely in the hands of the statutory body.

[45] We hasten to add that this proposition is wrong in law as the final decision on disclosure must lie with the court. It is the independence of the courts which allows them to be best placed to carry out this duty. This much was asserted in *Conway, supra*, where it was pronounced (at p 901):

> In many cases it will be plain that documents are within a class of documents which by their very nature ought not to be disclosed. Indeed, in the majority of cases I apprehend that a decision as to an objection will present no difficulty. The cases of difficulty will be those in which it will appear that, if there is non-disclosure, some injustice may result and that if there is disclosure the public interest may to some extent be affected prejudicially. The courts can and will recognise that a view honestly put forward by a Minister as to the public interest will be based on special knowledge and will be put forward by one who is charged with a special responsibility. As Lord Radcliffe said in the *Glasgow Corpn* case (1956 SC (HL) at p 18.), the courts will not seek on a matter which is within the sphere and knowledge of a Minister to displace his view by their own; but

> where there is more than one aspect of the public interest to be considered it seems to me that a court, in reference to litigation pending before it will be in the best position to decide where the weight of public interest predominates. I am convinced that the courts, with the independence which is their strength, can safely be entrusted with the duty of weighing all aspects of public interests and of private interests and of giving protection where it is found to be due.

[46] The courts are entrusted with the duty of being the guardians of the public interest, and in the exercise of this duty, to weigh both the public interest in the administration of justice and other public interests that may arise. The fact that the SC is a public body does not vindicate its failure to give clear, reasoned and valid justifications for its position in resisting disclosure. Bare assertions for non-disclosure will not suffice. In this regard, we are reminded of the observation of Lord Edmund-Davies in *D v. National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at p. 616:

> ... Accordingly, it would be unthinkable to vest the judiciary with a power to exclude in its discretion evidence relevant to the issues in civil proceedings merely because one side wants it kept out and the judge thinks that its disclosure is likely to prove embarrassing. In other words, the exclusion of relevant evidence always calls for a clear justification.

Conclusion

[47] In the circumstances, and for the reasons we have given, we were persuaded that the decision of the learned judge was plainly wrong and cannot be upheld. The appeal was accordingly allowed and the order of the High Court was set aside. We also ordered the matter to be remitted to the High Court for the learned judge to inspect the discovery documents as its final task in considering the claim for public interest immunity before ordering disclosure.

[48] We also ordered the SC to pay costs of RM12,000 to the appellant EY subject to payment of allocator fees. No order for costs against the first respondent, SJAM. Deposit to be refunded. By agreement of the parties, we also granted a stay of two months of our order pending the application for leave to the Federal Court.